



Docket No.: 210231US0

COMMISSIONER FOR PATENTS
ALEXANDRIA, VIRGINIA 22313

RE: Application Serial No.: 09/901,907
Applicants: Veronique GUILLOU, et al.
Filing Date: July 11, 2001
For: A TOPICAL CLEANSING COMPOSITION
Group Art Unit: 1617
Examiner: Gina C. Yu

SIR:

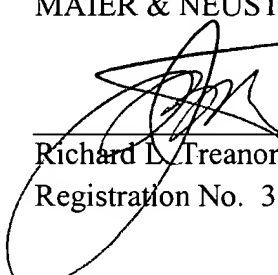
Attached hereto for filing are the following papers:

Appeal Brief w/Appendices.

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Respectfully submitted,

OBLON, SPIVAK, McCLELLAND,
MAIER & NEUSTADT, P.C.

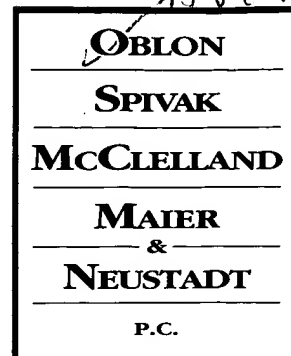

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IN THE UNITED STATES PATENT & TRADEMARK OFFICE

IN RE APPLICATION OF :
Veronique GUILLOU, et al. : EXAMINER: Gina C. Yu
SERIAL NO: 09/901,907 :
FILED: JULY 11, 2001 : GROUP ART UNIT: 1617
FOR: A TOPICAL CLEANSING COMPOSITION

APPEAL BRIEF

COMMISSIONER FOR PATENTS
ALEXANDRIA, VIRGINIA 22313

SIR:

Appellants submit this brief in response to the non-final Rejection dated December 22, 2005.

REAL PARTY IN INTEREST

The real party in interest herein is L'Oréal S.A. of Paris, France.

RELATED APPEALS AND INTERFERENCES

To the best of Appellants' knowledge, there are no other appeals or interferences which will directly affect or be directly affected by, or have a bearing on, the Board's decision in this appeal.

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STATUS OF CLAIMS

Claims 1-11 and 13-25 are pending. Claim 12 has been canceled. No claims have been withdrawn from consideration.

STATUS OF AMENDMENTS

All amendments and remarks filed in this case have been entered and considered.

SUMMARY OF CLAIMED SUBJECT MATTER

The invention relates to a cleansing composition comprising at least one phosphate surfactant component comprising at least one monoalkyl phosphate surfactant (specification at page 5, lines 5-24), at least one foaming non-ionic surfactant (specification at page 6, line 5 through page 8, line 24), and at least one cationic polymer devoid of saccharide groups (specification at page 9, line 5 through page 11, line 18) in an aqueous medium. (Specification at page 3, lines 20-24 and page 12, lines 13-19). The cleansing compositions have the appearance of a transparent gel. (Specification at page 3, lines 15-16). [See, claim 25].

In the invention compositions, the cationic polymer can be selected from the group consisting of homopolymers and copolymers of acrylic esters, methacrylic esters and amides comprising an anion derived from an inorganic or organic acid ; polymers of alkyldiallylamine or of dialkyldiallylammonium; quaternary polymers of vinylpyrrolidone, of imidazole, of vinylimidazole or of methylvinylimidazole; vinylpyrrolidone polymers comprising methacrylamidopropyl dimethylamine or methacrylamidopropyl trimethylammonium units; and their blends. (Specification at page 9, line 5 through page 11, line 18). [See, claims 23 and 24].

Also in the invention compositions, the surfactant component can consist essentially of at least one phosphate surfactant component comprising at least one monoalkyl phosphate

surfactant and at least one foaming non-ionic surfactant. (Specification at page 5, lines 5-24 and pages 15-16). [See, claim 1].

Also in the invention compositions, the composition can be free of amphoteric surfactant. (Specification at pages 15-16). [See, claim 24].

The invention also relates to methods of cleansing, scrubbing or exfoliating skin, scalp or hair using such cleansing compositions. (Specification at page 13, line 18 through page 14, line 18). [See, claims 19-22].

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. Whether the pending claims are obvious under 35 U.S.C. §103 over U.S. patent 6,090,773 (“Lukembach”) in view of U.S. patent 6,262,130 (“Derian”).

ARGUMENT

The invention compositions are cleansing compositions which have the appearance of a transparent gel. As noted in the present specification, those skilled in the art have searched for such transparent foaming gels because gel products are effective and pleasant to use, and transparent products are particularly preferred by consumers owing to the perception that such products are pure and clean. (See, specification at page 1, line 17 through page 2, line 1). However, producing such transparent foaming gels has been problematic in the past. (See, specification at page 2, lines 1-10).

The question on appeal is whether the combination of Lukembach and Derian would motivate one skilled in the art to produce the claimed transparent foaming gels and/or would

provide sufficient guidance to one skilled in the art to enable production of the claimed transparent foaming gels. As explained below, the cited art neither teaches nor suggests the invention compositions. Accordingly, the § 103 rejection should be reversed.

The Examiner's § 103 rejection is improper with respect to all pending claims because the combination of Lukenbach and Derian does not set forth a *prima facie* case of obviousness. Neither Lukenbach nor Derian teaches or suggests a transparent product. The Examiner does not assert that Lukenbach discloses transparent products. Rather, the Examiner asserts that Derian discloses "pumpable transparent gels," citing the abstract and col. 1, line 19 through col. 2, line 55 of Derian. (See, Office Action dated December 22, 2005, at page 4, lines 8-10). However, the Examiner has misinterpreted Derian's disclosure.

Derian neither teaches nor suggests that his compositions are transparent gels. Derian's abstract does not make such a disclosure. Moreover, col. 1, line 19 through col. 2, line 55, which is Derian's "Background" section, does not even relate to Derian's compositions. At any rate, Derian's "Background" section neither teaches nor suggests transparent products.¹

Thus, neither Lukenbach nor Derian teaches or suggests a transparent product. Because all of the appealed claims require the invention compositions to be transparent, the combination of Lukenbach and Derian cannot yield the invention compositions. For this reason alone, no *prima facie* case of obviousness exists, and the § 103 rejection is improper and should be reversed.

Furthermore, with respect to claims 1-11, 13-22 and 24, no *prima facie* case of obviousness exists because Lukenbach requires the presence of an effective amount of an

¹ Moreover, Derian's only reference to "gel" in the "Background" section is to a "non-flowable gel." (Col. 2, line 12). Given that Derian's compositions are "pumpable or flowable" (see, col. 2, line 58), Derian's compositions cannot be gels (as discussed by Derian).

amphoteric surfactant, whereas the invention compositions of claims 1-11 and 13-22 require the surfactant component to “consist essentially of” a phosphate surfactant component and at least one foaming non-ionic surfactant (that is, no other surfactants are present in an amount sufficient to materially affect the composition), and the invention composition of claim 24 does not contain any amphoteric surfactant. Derian, which merely relates to phosphate surfactants, cannot compensate for Lukenbach’s deficiencies. That is, nothing in Derian would motivate one skilled in the art to modify Lukenbach’s compositions by removing effective amounts of amphoteric surfactant, an element which is required by Lukenbach. For this reason as well the rejection of claims 1-11, 13-22 and 24 under 35 U.S.C. § 103 is improper and should be reversed.

Finally, as demonstrated by the March 2005 declaration submitted in this case, Appellants’ showing of “unexpected and surprising” results set forth in all of the Rule 132 declarations submitted in this case rebut any hypothetical case of *prima facie* case of obviousness which may exist.

More specifically, the March 2005 declaration demonstrates that Invention Composition A containing an anionic phosphate and a cationic polymer devoid of saccharide groups has significantly smaller bubble size, significantly more dense foam and significantly improved rinsing properties than compositions containing a surfactant other than an anionic phosphate or a cationic polymer containing saccharide groups. (Rule 132 dec., par. 6). The declaration also demonstrates that the claimed compositions have significantly improved foam volume properties than Comparative Example 3. (Rule 132 dec., par. 6).

As explained in the declaration, these results demonstrate that cationic polymers containing saccharide groups lead to compositions which are difficult to rinse as compared to compositions containing cationic polymers lacking saccharide groups (compare 6.5 of

Comparative Example 2 with 9.1 of Invention Composition A). (Rule 132 dec., par. 7).

These results also demonstrate that anionic surfactants which are not phosphates lead to compositions which (a) are more difficult to rinse (compare 8.1 of Comparative Example 3 with 9.1 of Invention Composition A); and (b) have low foam density (compare 6.3 of Comparative Example 3 with 7.5 of Invention Composition A) as compared to compositions containing anionic phosphates. (Rule 132 dec., par. 7).

The declaration also explains that the Rule 132 declaration submitted December 8, 2003 demonstrates that compositions having an anionic phosphate surfactant and a cationic polymer devoid of saccharide groups have smaller bubble size and greater foam density than compositions having a different type of anionic surfactant and a cationic polymer devoid of saccharide groups, and that the data set forth in the March 2005 declaration supplements this data. (Rule 132 dec., par. 9). The March 2005 declaration also explains that the data therein demonstrates that compositions having a cationic polymer containing saccharide groups have larger bubble size and lesser foam density than the invention compositions containing polymers devoid of saccharide groups. (Rule 132 dec., par. 9).

The March 2005 declaration goes on to explain that the Rule 132 declaration submitted August 26, 2004 demonstrates that the invention compositions having an anionic phosphate surfactant and a cationic polymer devoid of saccharide groups have greater foam volume and density than compositions having only an anionic phosphate surfactant, and that the data set forth in the March 2005 declaration supplements this data. (Rule 132 dec., par. 10). The March 2005 declaration also explains that the data therein demonstrates that compositions having a cationic polymer containing saccharide groups have lesser foam density than the invention compositions containing polymers devoid of saccharide groups. (Rule 132 dec., par. 10).

The March 2005 declaration then explains that the improved sensory characteristics obtained with the invention compositions in all of the Rule 132 declarations are representative of the present invention. (Rule 132 dec., par. 11). That is, it would be expected that compositions comprising a surfactant component consisting essentially of at least one phosphate surfactant and at least one foaming non-ionic surfactant, and at least one cationic polymer devoid of saccharide groups in an aqueous medium, the composition having the appearance of a transparent gel, would possess improved sensory characteristics like those of the exemplified invention compositions. (Rule 132 dec., par. 11).

The declaration then states that, in contrast, the comparative examples containing an anionic surfactant other than an anionic phosphate and/or a cationic polymer having saccharide groups possessed inferior sensory characteristics as compared to the invention compositions, and that this difference in sensory characteristics demonstrates the criticality of having both an anionic phosphate and a cationic polymer devoid of saccharide groups in the invention compositions. (Rule 132 dec., par. 12). This difference in sensory characteristics was unexpected and surprising. (Rule 132 dec., par. 12).

Finally, the March 2005 declaration explains the commercial significance of the improved sensory characteristics associated with the claimed compositions. The declaration explains that smaller bubble size and higher foam density are desirable physical properties for cleansing compositions because such properties lead to cleansing compositions having more commercially desirable characteristics such as, for example, better staying power and foam consistency, and that improved rinsibility is a desirable characteristic for commercial cleansing compositions. (Rule 132 dec., par. 13).

Clearly, all evidence of record demonstrates that “unexpected and surprising” benefits are associated with the claimed compositions. Accordingly, to the extent a *prima facie* case of obviousness exists, it has been rebutted and the § 103 rejection should be reversed.

In maintaining the § 103 rejection, the Examiner has asserted (in the Office Action dated December 22, 2005) that the cited art would have led to the expectation that the claimed compositions would possess good foaming and detergency properties, and that the data in the Rule 132 declarations are not “so significant” to demonstrate unexpected properties. The Examiner similarly asserted that legal precedent holding that recognizing unknown properties (such as better rinsibility and bubble size) in a known composition does not render such a composition patentable. The Examiner also asserted that the numerical values for sensory criteria discussed in the present application and the Rule 132 declarations submitted in this case are unclear. In short, the Examiner has dismissed Appellants’ data demonstrating unexpected or surprising results as being (1) predicted by/inherent in Lukenbach and Derian; and (2) unpersuasive.

Regarding the Examiner’s assertion that the beneficial properties associated with the invention compositions would have been predicted by or inherent in Lukenbach’s and Derian’s disclosures, nothing in Lukenbach would provide any guidance whatsoever to one skilled in the art regarding how to produce a suitable transparent gel product having good bubble, rinsibility **and** foam properties. This deficiency in Lukenbach’s disclosure is significant because compositions having all three properties are commercially desirable. (See, March 2005 Rule 132 dec., par. 13). Rather, one skilled in the art, following Lukenbach, would have to go through the same trial and error process that he would have to go through in the absence of Lukenbach, mixing and matching elements in the hope that some unspecified combination of elements would be successful in yielding a transparent gel

having all of the sought-after properties. Derian, which merely relates to phosphate surfactants, does not provide any of the critical guidance missing from Lukenbach. Thus, the unexpected and surprising results demonstrated by the Rule 132 declarations -- that is, that the invention compositions are transparent gels having good bubble, rinsibility and foam properties -- are not predicted by or inherent in Lukenbach's or Derian's disclosure.

Regarding the Examiner's assertion that the submitted data are unpersuasive, the Examiner is attempting to employ a standard which is too high regarding the necessary showing of unexpected results sufficient to rebut a *prima facie* case of obviousness. Appellants should not have to demonstrate that all the improved or beneficial properties upon which they rely would not have existed in previous compositions to demonstrate unexpected results. Rather, all that is necessary is that Applicants demonstrate the superiority of at least one property shared with prior art compositions. (MPEP § 716.02 (a)(II)). Here, Applicants have provided the requisite showing, having demonstrated the improved bubble, rinsibility and foam properties of the claimed compositions. That all of these improved properties could exist in a single transparent gel composition could not have been expected from Lukenbach's broad, general disclosure.

Moreover, regarding the Examiner's assertion that the data are unpersuasive because they are unclear, this assertion is incorrect. Pages 17-18 of the present specification clearly explain how the quantitative numbers set forth in the examples and in the Rule 132 declarations were obtained. These pages describe a precise methodology for testing compositions. (Page 17, lines 10-20). They also describe the criteria by which the compositions were evaluated, including the meaning of the numbers used for such evaluation (for example, for foam volume, "the grade attributed increases as the volume increases"). (Page 17, line 21 through page 18, line 12). Thus, the numbers used for such evaluation are

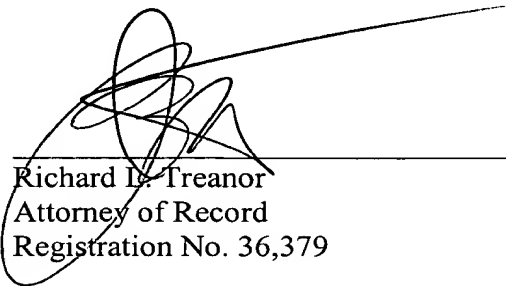
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ties to specific physical characteristics of the tested compositions, and these numbers reflect relative differences among the tested compositions (for example, for foam volume, higher numbers reflect foam having greater volume). Clearly, based on the information provided at pages 17-18 of the present specification, one skilled in the art would recognize the significance and meaning of the numbers provided in the examples and in the Rule 132 declarations, as well as how differing numbers demonstrate the different physical characteristics of the tested compositions.

Accordingly, in view of the above remarks and reasons explaining the patentable distinctness of the presently appealed claims over the applied prior art, Appellants request that the Examiner's rejections all be REVERSED.

Respectfully submitted,

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APPENDIX I (CLAIMS)

1. (Previously Presented): A cleansing composition, comprising:

a surfactant component consisting essentially of at least one phosphate surfactant component comprising at least one monoalkyl phosphate surfactant and at least one foaming non-ionic surfactant, and at least one cationic polymer devoid of saccharide groups in an aqueous medium, the composition having the appearance of a transparent gel, wherein the cationic polymer is selected from the group consisting of homopolymers and copolymers of acrylic esters, methacrylic esters and amides comprising an anion derived from an inorganic or organic acid ; polymers of alkylallylamine or of dialkylallylammonium; quaternary polymers of vinylpyrrolidone, of imidazole, of vinylimidazole or of methylvinylimidazole; vinylpyrrolidone polymers comprising methacrylamidopropyltrimethylamine or methacrylamidopropyltrimethylammonium units; and their blends.
2. (Original): The composition according to Claim 1, which has a turbidity ranging from 2 to 500 NTU.
3. (Previously Presented): The composition according to Claim 1, wherein the monoalkyl phosphate surfactant is selected from the group consisting of monoalkyl phosphates, their salts and their mixtures.
4. (Previously Presented): The composition according to Claim 1, wherein the phosphate surfactant component is selected from the group consisting of monolauryl phosphate, the potassium salt of dodecyl phosphate, a mixture of the octyl monoester and the octyl diester of phosphoric acid, a mixture of ethoxylated (7 mol. of EO) 2-butyloctanol monoester and the ethoxylated (7 mol. of EO) 2-butyloctanol diester of phosphoric acid, the

potassium or triethanolamine salt of monoalkyl (C₁₂-C₁₃) phosphate, potassium lauryl phosphate as a 40 % aqueous solution, and their mixtures.

5. (Original): The composition according to Claim 1, wherein the amount of the phosphate surfactant(s) ranges from 1 % to 50 % by weight of active material based on the total weight of the composition.

6. (Original): The composition according to Claim 5, wherein said amount of the phosphate surfactant(s) ranges from 1.5 % to 20 % by weight.

7. (Original): The composition according to Claim 1, wherein the foaming nonionic surfactant gives a foam height $H \geq 3$ cm.

8. (Original): The composition according to Claim 7, wherein the foaming nonionic surfactant gives a foam height $H \geq 5$ cm.

9. (Original): The composition according to Claim 1, wherein the foaming nonionic surfactant is selected from the group consisting of polyglycerolated fatty alcohols; esters of fatty acids and polyols; alkoxyated alkamides; glucamine derivatives; alkylpolyglucosides; and their mixtures.

10. (Original): The composition according to Claim 1, wherein the amount of nonionic surfactant(s) ranges from 1 % to 50 % by weight of active material based on the total weight of the composition.

11. (Original): The composition according to Claim 10, wherein the amount of nonionic surfactant(s) ranges from 1.5 % to 20 % by weight of active material based on the total weight of the composition.

12. (Canceled).

13. (Previously Presented): The composition according to Claim 1, wherein the cationic polymer is selected from the group consisting of polyquaternium-5, polyquaternium-

6, polyquaternium-7, polyquaternium-11, polyquaternium-15, polyquaternium-16, polyquaternium-22, polyquaternium-28, polyquaternium-39, polyquaternium-44, polyquaternium-46, polyquaternium-47 and their blends.

14. (Original): The composition according to Claim 1, wherein the amount of cationic polymer(s) ranges from 0.01 % to 5 % by weight of active material with respect to the total weight of the composition.

15. (Original): The composition according to Claim 14, wherein the amount of cationic polymer(s) ranges from 0.05 % to 2 % by weight of active material with respect to the total weight of the composition.

16. (Previously Presented): The composition according to Claim 1, which comprises (1) at least one phosphate surfactant component selected from the group consisting of monolauryl phosphate, the potassium salt of dodecyl phosphate, the octyl monoester and octyl diester of phosphoric acid, the ethoxylated (7 mol. of EO) 2-butyloctanol monoester and the ethoxylated (7 mol. of EO) 2-butyloctanol diester of phosphoric acid, the potassium or triethanolamine salts of monoalkyl (C₁₂-C₁₃) phosphate, or potassium lauryl phosphate, (2) at least one foaming nonionic surfactant selected from the group consisting of alkylpolyglucosides and polyglycerolated fatty alcohols, and (3) at least one cationic polymer selected from the group consisting of polyquaternium-5, polyquaternium-47, polyquaternium-7, polyquaternium-39, polyquaternium-28 and polyquaternium-44.

17. (Previously Presented): The composition according to Claim 1, wherein the composition is an aqueous composition which in addition to water comprises at least one component selected from the group consisting of lower alcohols, polyols, sugars and their mixtures.

18. (Original): The composition according to Claim 1, which further comprises at least one thickening agent.

19. (Original): A method for cleansing and/or removing make-up from the skin, scalp and/or hair, comprising:

applying the cleansing composition of Claim 1 to the skin, scalp or hair; and then rinsing the skin, scalp or hair to remove the cleansing composition.

20. (Original): A method for scrubbing and/or exfoliating the skin or scalp, comprising:

applying the cleansing composition of Claim 1 to the skin or scalp; and then rinsing the skin or scalp to remove the cleansing composition.

21. (Original): A method for cleansing the skin or scalp of grime, comprising:

applying the cleansing composition of Claim 1 to the skin or scalp; and then rinsing the skin or scalp to remove the grime and cleansing composition.

22. (Original): A method for cleansing the skin, scalp or hair of grease, comprising:

applying the cleansing composition of Claim 1 to the skin, scalp or hair; and then rinsing the skin, scalp or hair to remove the grease and cleansing composition.

23. (Previously Presented): A cleansing composition, which comprises:

at least one phosphate surfactant component comprising at least one monoalkyl phosphate surfactant, at least one foaming nonionic surfactant and at least one cationic polymer devoid of saccharide groups and selected from the group consisting of (1) homopolymers and copolymers of acrylic acid and methacrylic acid esters or amides, (2) alkyldiallylamine or dialkyldiallylammonium polymers, (3) quaternary polymers of vinylpyrrolidone and imidazole or of vinylimidazole or methylvinylimidazole and (4) vinylpyrrolidone polymers comprising methacrylamidopropyldimethylamine or

methacrylamidopropyltrimethylammonium units in an aqueous medium, the composition having the appearance of a transparent gel.

24. (Previously Presented): A cleansing composition, comprising:

at least one phosphate surfactant component comprising at least one monoalkyl phosphate surfactant, at least one foaming non-ionic surfactant, and at least one cationic polymer devoid of saccharide groups in an aqueous medium, wherein the composition has the appearance of a transparent gel and wherein the composition does not contain amphoteric surfactant, wherein the cationic polymer is selected from the group consisting of homopolymers and copolymers of acrylic esters, methacrylic esters and amides comprising an anion derived from an inorganic or organic acid ; polymers of alkyldiallylamine or of dialkyldiallylammonium; quaternary polymers of vinylpyrrolidone, of imidazole, of vinylimidazole or of methylvinylimidazole; vinylpyrrolidone polymers comprising methacrylamidopropyl dimethylamine or methacrylamidopropyltrimethylammonium units; and their blends.

25. (Previously Presented): A cleansing composition, comprising:

at least one phosphate surfactant component comprising at least one monoalkyl phosphate surfactant , at least one foaming non-ionic surfactant, and at least one cationic polymer devoid of saccharide groups in an aqueous medium, the composition having the appearance of a transparent gel, wherein the cationic polymer is selected from the group consisting of homopolymers and copolymers of acrylic esters, methacrylic esters and amides comprising an anion derived from an inorganic or organic acid ; polymers of alkyldiallylamine or of dialkyldiallylammonium; quaternary polymers of vinylpyrrolidone, of imidazole, of vinylimidazole or of methylvinylimidazole; vinylpyrrolidone polymers comprising

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methacrylamidopropyldimethylamine or methacrylamidopropyltrimethylammonium units;
and their blends.

APPENDIX II (EVIDENCE)

1. Rule 132 declaration submitted April 25, 2002.
2. Rule 132 declaration submitted December 8, 2003.
3. Rule 132 declaration submitted August 26, 2004.
4. Rule 132 declaration submitted March 9, 2005.